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DEBT, ASSUMPSIT, AND CONSIDERATION.

LORD MANSFIELD is said to have remarked that "nothing in law is so apt to mislead as a metaphor;"[1] and if the remark is applied to branches of the law, the principles of which are fully developed and abundantly illustrated by decided cases, it is doubtless very true. But the historian of law, who looks at the efforts of the courts to create these principles by the expansion and adaptation of a few narrow remedies, will not be inclined to undervalue the use of the metaphor or analogy, when used to give effect to the requirements of public policy, and with a due regard to the claims of the technical logic appropriate to the system in which it is employed. A very cursory acquaintance with the Year Books will illustrate this point. The lawyers constantly used the analogies to be derived from the rules applicable to one class of writ to maintain the argument which they were urging as to the law applicable to proceedings under another class of writ.[2] Thus, as I have elsewhere pointed out, the real actions were the most highly developed class of actions in the mediaeval common law; and therefore we often find that analogies derived from them, or rules of law first applied in reference to them, are, when necessary, extended by analogy to other classes of action.[3] Still more often do counsel in search of an argument use these analogies; and to us who look at their arguments from the point of view of the settled modern law, and not from the point of view of the period when this law was still in the mak-

[1] Per Lord Westbury, Knox v. Gye (1872) L. R. 5 H. of L. at p. 676.

[2] e. g. Y. B B., 2 Ed. IV. Mich. pl. 8; 6 Hy. VII. Mich. pl. 4, pp. 8 and 9, per Vavisor and Brian, as to the effect of a release by the true owner to one who had unlawfully taken goods.

[3] Thus the rules as to payment or tender, Litt. §§ 335, 344, are discussed by Littleton in reference to the real actions, but are explained generally in reference to other branches of the law by Coke in his Commentary.

ing, they often seem to use them very wildly.[4] This process was carried out on a great scale by COKE in his Commentary on LITTLETON, and in his Reports, and, on the whole, he and others of his contemporaries very skillfully adapted by this method much of the mediæval law of the Year Books to modern needs.[5]

It is my object in this paper to call attention to one particular case in which this argument from metaphor or analogy has had a large influence on the development of our law. I hope to show that an analogy derived from the action of Debt was one of the means used to so extend the action of Assumpsit that it became an effective means of enforcing all kinds of simple contracts, and that some of our modern difficulties in relation to the doctrine of consideration arise from the fact that these extensions of Assumpsit were based, not on strictly logical grounds, but upon arguments derived from analogy or metaphor.

The nature of the action of Debt is well known.[6] The limitations of its scope, and its procedural defects, made it a very unsatisfactory form of remedy for the enforcement of contractual obligations. Nevertheless in its application to the contract of sale of goods there had been, in the course of the fifteenth century, an important development. As a rule the *quid pro quo* needed to support an action of Debt must be something actually given or done. But in the case of a contract for the sale of goods it had come to be recognized that the agreement to pay was sufficient *quid pro quo* for the agreement to deliver. On such an agreement the vendor could bring Debt for the price; and the purchaser could bring Detinue for the goods.[7] And, as I have elsewhere pointed out,[8] this extension in the scope of the action of Debt is probably the origin of the rule that in English Law a contract of sale passes the property in the goods. It was this extension of the action of Debt which I hope to show had a certain amount of influence on the action of Assumpsit.

During the fifteenth and sixteenth centuries the judges of the

[4] See an instance from Y. B. 19 Hy. VI. Pasch. pl. 1, p. 64, cited by the present writer in Columbia Law Review XII. 19, n. 85, in which counsel tried to argue that taxes granted by Parliament were similar to the profits of a court.

[5] We may cite as illustrations the manner in which the position of the copyholder was settled, Copyhold Cases, 4 Co. Rep. 21a-32a; the manner in which in Chudleigh's Case and other cases rules were laid down for the creation of executory interests; the relaxation of the strict rule as to venue, so as to allow the trial of contracts to be performed abroad to be tried by the common law courts, Dowdale's Case (1606) 6 Co. Rep. 47b, 48a.

[6] See for a short account Ames, Essays in Anglo-American Legal Hist. III, 313-319; Holdsworth, Hist. Engl. Law, III, 326-329.

[7] Holdsworth, Hist. Eng. Law, III, 282.

[8] Ibid, 283, 284.

common law courts were trying to evolve an adequate remedy for the enforcement of simple contracts; and their ingenuity was sharpened by the knowledge that, if they did not succeed in their quest, the Chancellor would undoubtedly absorb the lion's share of the jurisdiction over this important branch of law. For it was clearly contrary to equity, as understood in the sixteenth century,[9] that men should be allowed to break their contracts as they pleased. The precise manner in which the Chancellor would have filled this wide gap in our law, if the common lawyers had not succeeded in their quest, is still to some extent a matter of conjecture. But we may hope shortly to learn something definite on this matter from the researches of Mr. Willard T. BARBOUR, formerly of Oriel College, and now of the University of Michigan, who has written for his B. Litt. degree in this University a very able thesis on this very subject. I hope that he will shortly publish the results of his researches into the records of the Court of Chancery which bear on this question; and that he will go on to fill by like researches the gap in our knowledge of the history of equity from the earliest times till the reports begin at the end of the sixteenth century. But the nature of the principles which the Chancellor would have applied if the common lawyers had not found an adequate remedy is a matter rather of historical and academic interest than of practical importance; for he did not have the chance of applying them. The development of Assumpsit filled the gap, and filled it adequately. Equity only interfered, as the dialogue of the Doctor and Student explains, when the law was inadequate or unfair;[10] and therefore in the course of the sixteenth century the Chancellor accepted the theory of contract developed by the common law, and only interfered, as BROOK notes, when the common law remedy of damages was insufficient.[11]

This development of Assumpsit into an action which would effectually enforce simple contracts involved two great extensions. In the first place it was extended so as to cover a mere nonfeasance, as distinct from a misfeasance, in breach of an undertaking; and, in the second place, it was extended so as to cover the breach of a wholly executory contract, i. e. to the case where neither party had as yet done anything in performance of his agreement.

The first extension was made during the second half of the fif-

[9] For some account of the place which equity filled in the minds of lawyers of the fifteenth and sixteenth centuries see an article by the present writer in Law Quart. Rev. XXVIII, 240-242.

[10] Bk. I c. 16; cp. Law Quart. Rev. XXVIII, 240, nn. 3 and 4.

[11] Brook, Ab. "Action sur le case," pl. 72; Cp. Cary, Rep. in Chy. 5.

teenth century. It is quite clear from the cases that the judges, in order to justify it technically, made use of the analogy presented by the action of Debt brought upon a contract for the sale of goods. One of the earliest of these cases was an action by a purchaser of land, who had paid his money, against the vendor who failed to carry out his side of the contract. One of the arguments used to justify the grant of an action of Assumpsit in this case of nonfeasance was this analogy derived from the action of Debt. A vendor of goods, it was said, has Debt on an agreement to sell goods, and a purchaser Detinue on an agreement to buy goods. Similarly a vendor has debt on an agreement to sell land if he has conveyed the land; but as the purchaser has not got Detinue, he must be given an action on the case.[12] This case was really the foundation of a line of cases which laid it down that if one person has paid money or incurred any other detriment on the faith of a promise made to him, he can sue by action of Assumpsit.[13] Some of the judges indeed wished to push the analogy further and to hold that, just as an agreement to sell goods gave the purchaser the right to bring Detinue and the vendor the right to bring Debt, so an agreement to buy land (though the money was not paid) would give rise to an action on the case. But this really involved a circular method of reasoning. What detriment could arise from the making of such an agreement except upon the hypothesis that the counter-agreement was actionable?—which was the thing to be proved.[14]

It was not till the middle of the sixteenth century that the judges began to incline to the belief that, if a promise were made for a promise, both promises could be enforced by action of Assumpsit; and it was not till the end of the century that the principle was accepted as settled law. Now it must be admitted that this extension did not owe so much to analogies derived from the action of Debt as the first extension. But indirectly it owed something, because, if the first extension had not been made, this second extension would not have been possible.

Probably the first development in this direction was made by the decision that a special promise by a debtor to pay his debt would allow the creditor to bring Assumpsit on this special promise.[15] This

[12] Y. B. 20 Hy. VI, Trin. pl. 4; Holdsworth, Hist. Eng. Law, III, 337-339.

[13] Holdsworth, Hist. Eng. Law, III, 341-344.

[14] Holdsworth, Hist. Eng. Law, III, 339-341.

[15] Brook, Ab. "Action sur le case," pl. 5.—"Ou home est endetted a moy et il promes de payer devant Michaelmas jeo puis aver accion de dett sur le contract ou accion del case sur le promise....car sur le promise ne gist accion de dett." This remark does not occur in the case which Brook was abridging, Y. B. 27 Hy. VIII, Mich. pl. 3; thus as Mr. Street says (Foundations of Legal Liability II, 61, n. 1), the principle

in itself was not a violent departure from principle, because by hypothesis the promisor is indebted i. e. the promisee has already incurred the detriment on the faith of which the promise to pay is made. It is really the converse case to the earlier line of cases noted above. The earlier line of cases decided that when money was paid or other detriment incurred on the faith of a promise, and the promise was not fulfilled, Assumpsit lay: the later line of cases that where the undertaking was fulfilled, so that a debt arose, which debt was not paid, a promise to pay this debt was actionable. But if payment would give rise to an action, when the promise on the faith of which the payment was made was not fulfilled; and if the fulfilment of the promise for which payment was expected would give rise to an action on a special promise to pay,—why should not any promise be actionable if given for a promise? The growing popularity of Assumpsit, in which the promise was the gist of the action, naturally brought this idea to the front; and its intrinsic reasonableness, coupled with considerations of public policy, caused it to prevail.[16] But in *Slade's Case,* which marks the final victory of the principle, because it was there applied even to those contracts on which Debt lay, and even to cases where no special promise had been made, we see again the old analogy based on action of Debt. Just as the reciprocal grant of the right to the money and the right to the goods gives reciprocal actions of Debt based on these grants, so the reciprocal promises of vendor and purchaser will give rise to reciprocal actions of Assumpsit based on these promises.[17]

It is thus clear that analogies drawn from the action of Debt, as applied to contracts for the sale of goods, have had some influence upon the technical reasoning employed by the judges to justify their

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must be of later origin, "but as Brook died in 1558 the date when the point was decided cannot be far from the middle of the century;" and as Mr. Street notes in another case abridged by Brook in the same title, pl. 105, dated 33 Hy. VIII, the principle seems to be admitted.

[16] Ames, Essays in Anglo-American Legal History, III, 313, n. 2, and Street, op. cit. 55, n. 6, cite Pecke v. Redman (1555) Dyer 113a as the earliest case in which effect was given to a purely executory contract; and the case seems to be so treated by Coke in Slade's Case (1602) 4 Rep. at p. 94b; but it does not appear from the report in Dyer whether or no the contract had not been partly performed; however, the case of Strangborough v. Warner (1588) 4 Leo. 3 is quite conclusive, and it was quickly followed by other cases in which the same point was adjudged; see for these cases Street, op. cit. 55, n. 8.

[17] "Every contract executory imports in itself an assumpsit, for when one agrees to pay money or to deliver anything, thereby he assumes or promises to pay or deliver it, and therefore when one sells any goods to another and agrees to deliver them at a day to come, and the other in consideration thereof agrees to pay so much money at such a day, both parties may have an action of debt, or an action on the case on assumpsit, for the mutual executory agreement of both parties imports in itself actions upon the case as well as action of debt," 4 Co. Rep. at p. 94a.

extensions of the action of Assumpsit. But analogy, even when close, is not logic; and, though from the point of view of public policy these extensions were most beneficial, it would be difficult to maintain that they were in all respects strictly logical. More especially was this so in the case of the extension which allowed that Assumpsit would lie upon a promise if made in return for a counter promise. Naturally when the conditions precedent for a successful action of Assumpsit were generalized under the term Consideration; when lawyers began to speculate upon the nature of Consideration, and to lay down the rules to which it must conform, difficulties (1) as to the essential qualities of a valid consideration, and (2) as to the practical application of the doctrine, began exactly at those points at which this logical hiatus occurred.

(1) It has been too hastily assumed that the essence of consideration is always some detriment incurred by the promisee upon the faith of the promise made to him.[18] But, as Mr. STREET has clearly shown, this generalization will not apply to purely executory promises. Where the consideration is only promise for promise, the making of the counter promise does not expose the promisee to any detriment, unless the counter promise is actionable; and the counter promise is only actionable by virtue of this positive rule of law that promise for promise is actionable.[19] "It is commonly assumed," says Mr. STREET,[20] "that in the bilateral contract the mutual promises are considerations for each other in the sense that the word 'consideration' bears when one speaks of the ordinary unilateral promise. But this is a mistake. The bilateral contract is not based upon consideration in the sense of detriment, but is based solely upon consent, and when we say that mutual promises are considerations for each other we use the term 'consideration' in the broad sense of reason, cause, or equivalent." Mr. STREET therefore proposes to divide considerations into three classes.[21] First, detriment to the promisee; second, mutual promises; and third, legal duty or precedent debt.

Now it is clear that the first corresponds to the original scope of assumpsit as extended to remedy a nonfeasance, while the second

[18] In my History of English Law, III, 345, 346, the point that the consideration of promise for promise cannot be brought under the head of detriment to the promisee is not quite clearly brought out; but in the next volume, in which I shall deal specifically with consideration, I shall hope to remedy this.

[19] Op. cit. II, 108, "In order to sustain this view [that each party incurs a detriment by promising] it is necessary to assume that the promise creates a legal obligation, for there can be no detriment where the promise is not binding. The proposition in question therefore exhibits the weakness of reasoning in a circle."

[20] Ibid, 57.

[21] Ibid, 61.

and the third correspond to the further extensions of its scope to remedy purely executory contracts, and cases which fell within the scope of the action of debt. But I think that the third class can really be brought under the first. The debt which the promisor had incurred to the promisee was consideration for the promise to pay, whether that promise was express or implied, because the payment or performance which constituted the debt was a detriment to the promisee. On the other hand, as I have said before, I agree with Mr. STREET that the consideration of mutual promises cannot be brought under this generalization.

(2) Again, it is precisely at these same two points that the most debatable questions in the practical applications of the doctrine of consideration have arisen. (a) If a precedent debt is a valid consideration for a subsequent promise, will any past act beneficial to the promisor be a valid consideration? (b) If a promise for a promise is a valid consideration, will a promise to perform or the actual performance of something that the promisor is legally liable to perform be a valid consideration?

(a) As early as 1568[22] the distinction between a past act which will be a good executed consideration for a subsequent promise, and a past act which cannot be connected in any way with the subsequent promise, and cannot therefore be consideration for it, was clearly perceived. The court drew a clear distinction between a past act done from a friendly motive without expectation of payment; and an act done upon request. The first was held to be no consideration, the second a valid consideration;[23] and in 1585[24] the distinction was laid down in almost the modern fashion of RHODES J. "If," he said,[25] "one serve me for a year and hath nothing for his service, and afterwards, at the end of the year, I promise him 20 pounds for his good and faithful service ended, he may have and maintain an action upon the case upon the same promise, for it is made upon a good consideration; but if a servant hath wages given him, and his master, *ex abundanti,* doth promise him 10 pounds more after his service ended, he shall not maintain an action for that 10 pounds upon the

[22] Hunt v. Bates, Dyer 272a.

[23] The facts were that A's servant was arrested. B, the plaintiff, and C, friends of A, bailed him out that A's business might not suffer. The master promised the plaintiff to save him from any liability, and it was for breach of this promise that action was brought. The Court held that no action lay because, "there is no consideration wherefore the defendant should be charged for the debt of his servant, unless the master had first promised to discharge the plaintiff before the enlargement and main-prize made of his servant, for the master did never make request to the plaintiff for his servant to do so much, but he did it of his own head."

[24] Sidenham and Worlington's Case, 2 Leo. 224.

[25] At. p. 225.

said promise; for there is not any new cause or consideration preceding the promise." "Which difference," says the reporter, "was agreed by all the justices." It is clear that the judges have a clear appreciation of the difference between a past and an executed consideration. They do not confuse counsel by talking about an exception to the rule that past consideration is no consideration in cases where that past consideration has been conferred at the request of the promisee. Rather they regard a promise made in return for some benefit conferred in the obvious expectation of reward as an executed consideration for the subsequent promise to pay. Lord BOWEN'S judgment in *Stewart* v. *Casey*[26] reproduces the spirit of these sixteenth century decisions. And this is not surprising. Judges who had themselves had a hand in so moulding Assumpsit that it could do the work of Debt, and in adapting the general term 'consideration' to express the conditions under which Assumpsit would lie upon a simple contract, were likely to have a clear notion upon a fundamental question of this kind, which was likely to give rise to constantly occurring cases. They were likely to have a clearer idea upon this matter than some of their successors who, having had time to forget the procedural basis upon which the doctrine of consideration rested, supplied this gap in their learning by somewhat *a priori* views as to its nature and limitations.[27]

(b) Upon the second of these two debatable questions—the question whether a promise to perform or the actual performance of something that the promisor is legally liable to perform is a valid consideration—their views were by no means so clear; and partly because of this fact, partly because of the rarity of cases of this kind, this has been for many years the most uncertain of all the problems connected with the doctrine of consideration.[28] One point is however fairly clear. It is pretty certain that a promise to perform something that the promisor was already legally liable to perform was regarded as a valid consideration.

Two cases, one of 1600 and the other of 1616, are really conclusive on this point. In the case of *Sherwood* v. *Woodward*[29] the plaintiff

[26] 1892 1 Ch. at pp. 115, 116,—"The fact of a past service raises an implication that at the time it was rendered it was to be paid for; and, if it was a service which was to be paid for, when you get in the subsequent document a promise to pay, that promise may be treated either as an admission which evidences, or as a positive bargain which fixes, the amount of that reasonable remuneration on the faith of which the service was originally rendered."

[27] Below p. 356.

[28] References to the literature on this subject will be found in Street, op. cit. II, 118, n. 9, 119, n. 1; and in the essays cited 107, n. 1; Pollock, After thoughts on Consideration, Law Quart. Rev. XVII, 419-422.

[29] (1600) Cro. Eliza. 700.

sold cheeses to the defendant's son. The defendant "in consideration the plaintiff would deliver the said cheeses to his said son, assumed that if the son did not pay for them then he would." The son did not pay, and the plaintiff sued on this promise. In arrest of judgment it was moved "that this was not any consideration; for it is no more than what the law appoints to deliver that which he sold." The Court overruled this objection and held the consideration valid. In the case of *Bagge* v. *Slade*,[30] "Two men were bound in a bond for the debt of a third man; the obligation being forfeited, so that they both of them were liable to pay this; the plaintiff here in this writ of error said to the other, pay you all the debt, and I will pay you the moyety of this again, the which he paid accordingly, and so made his request to have a repayment made to him of the moyety according to his promise, which to do he refused." Thereupon the plaintiff sued for the moiety, and judgment was given for him.

Now it is reasonably clear that both these cases were cases of promise for promise. It is clear in the first case that when the promise was made the cheese was not yet delivered; and in the second case that when the promise was made the money had not yet been paid. For this reason no valid objections can be taken to the actual decisions in these cases. A promise for a promise was clearly a valid consideration—why should not a promise to perform a duty by a third person legally enforceable be a good consideration for a counter-promise? No exceptional rule excluding this particular kind of promise from the general rule that mutual promises are a valid consideration for each other can, as Sir F. POLLOCK has pointed out,[31] be produced.

Unfortunately in both cases the judges seemed to consider that the performance of the act, rather than the promise to perform, was the consideration. In the first case GAWDY and FENNER said, "It is an ease to the bargainee to have them without suit. There is a *new act done by him upon this agreement* and it is an ease to the vendee."[32] It is clear that they considered that the *new act*—the performance—was a consideration. They seem also to suggest that the benefit to the son was also a consideration which was really wholly inadmissable, unless such benefit was also a detriment to the promisee. In *Bagge* v. *Slade*, COKE, C. J., said, "the parties own contract here should bind him, he hath no remedy for the money paid, but when this is paid, here is a good assumpsit grounded upon a good consideration for repayment of the moyety of the plaintiff." And again, "I have never

[30] (1616) 3 Bulstr. 162.
[31] Law Quart. Rev. XVII, 421.
[32] Sherwood v. Woodward, Cro. Eliza. 700.

seen it otherwise, but when one draws money from another, that this should be a good consideration to raise a promise."[33] It would seem that COKE was confusing the case where money had been paid in pursuance of a contract, so that a debt was thereby created and an obligation enforceable by Assumpsit incurred, and the case where money was paid to discharge an existing debt. In other words (to use Roman terms) he was confusing the payment of money which created a *mutuum*, with the payment of money which operated as a *solutio*.[34] This confusion of contract and quasi-contract (fostered both at Rome and in England by the similarity of the remedy by which they were enforced) came to have an unfortunate influence upon the doctrine of consideration.[35] The lawyers came to think that wherever Assumpsit lay a contract must be found and consideration must be present.[36] This led to much ingenuity in the manufacture of considerations; and tended to obscure the real basis upon which that doctrine rested. In fact it had no small influence in causing that confusion between moral obligation and consideration for which some of the decisions of Lord MANSFIELD and his immediate successors are unfortunately distinguished.[37]

As a matter of fact there are two good reasons why performance of an existing obligation must be regarded as contrary to the principles which governed (even in the sixteenth and early seventeenth centuries) the creation of a valid consideration. In the first place the performance of an existing obligation is a past act from which no request can be implied; and therefore no promise express or implied can be grounded on it.[38] In the second place such a performance is no detriment to the promisee;[39] and that this was an essential part of a valid consideration was recognized in 1584.[40]

We can hardly expect that the generation of lawyers who had created the doctrine of consideration, should be able to solve all the

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[33] 3 Bulstr. 162.

[34] A similar fallacy to that pointed out in Gaius, Institutes, III, § 91.

[35] For the relations of Indebitatus Assumpsit to Quasi-contract, see Anson, Contracts (12th ed.) 395, 396.

[36] Cp. Holdsworth, Hist. Eng. Law, III, 330, n. 2.

[37] Anson, op. cit. 397.

[38] Above pp. 353-4.

[39] Law Quart. Rev. XVII, 419, 420.

[40] Richards and Bartlet's Case 1 Leo. 19.—R, executrix of A sued B for the price of corn delivered by her testator. B pleaded that, after the contract made, R agreed that in consideration that the corn had been lost by tempest he would only charge part of the price, which part he had always been ready to pay; but the whole Court found for the plaintiff, "because that here is not any consideration set forth in the bar, by reason whereof the plaintiff should discharge the defendant of this matter, for no profit but damage comes to the plaintiff by this new agreement, and the defendant is not put to any labour or charge by it, therefore here is not any agreement to bind the plaintiff."

problems to which that doctrine gives rise. That they did so much may well excite our admiration. In truth the legal ability displayed by the lawyers of the sixteenth and early seventeenth centuries is as remarkable as the ability displayed by the seamen, the statesmen, the writers and the men of science of this period. In many departments of law statesmen and lawyers succeeded with extraordinary skill in the difficult task of adapting mediæval rules and remedies to modern needs with the minimum of violent change. The manner in which they moulded the action of Assumpsit, partly by logical extension, partly by the skilful use of analogies derived from the action of Debt, and partly by their own clear perception of the conditions under which it was expedient to enforce agreements; and the manner in which, by generalizing the conditions under which that action lay, they gave the common law an entirely original theory of contract—are perhaps the most striking illustrations of that power. No doubt they left some problems to their successors to solve; and, since those successors were often men who had forgotten or who ignored the procedural basis from which the doctrine of consideration had been evolved, they sometimes created more difficulties than they solved. In more recent years the sounder knowledge of this branch of our legal history, to which the lawyers of the United States have mainly contributed, has restored to us the original basis upon which the creators of that doctrine built. The restoration has done more than anything else to settle modern doubts, and to solve the problems which must arise in any system which bases its law of contract upon this doctrine.

I hope that the readers of this paper will not consider that this attempt of the writer to state in his own way some of the results of the work of such distinguished legal historians as AMES, POLLOCK, and STREET is superfluous. That I have added anything very new to a branch of legal history, which has been fully discussed from many points of view, I cannot claim. But, as I know from experience, to state old facts in a new way sometimes helps the learner. If I have done this my object will have been achieved.

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